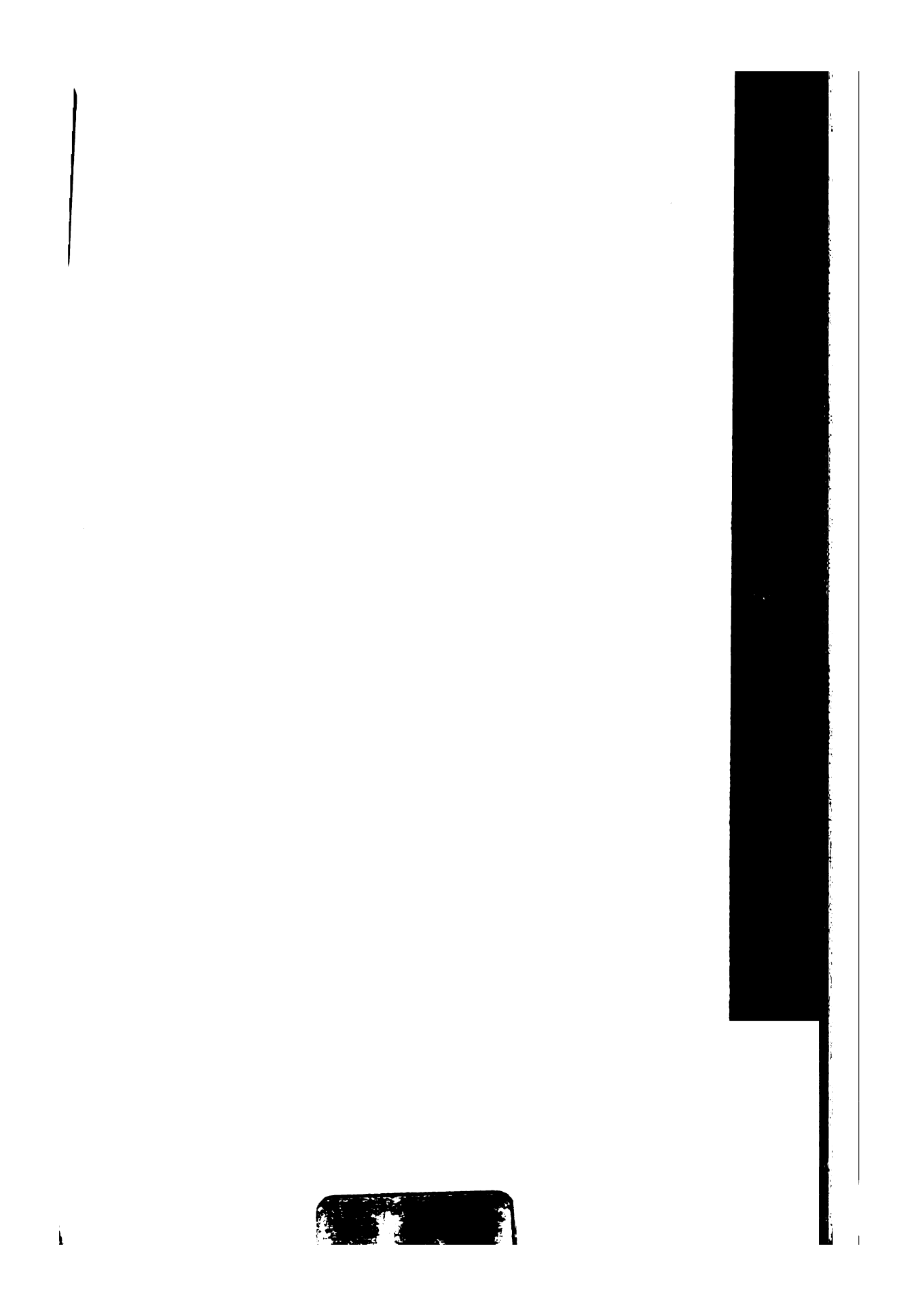

AMENDMENT TO SECTION 10 OF THE CLAYTON ACT

HEARING

BEFORE THE

U.S. Congress House.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

OF THE HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

THIRD SESSION

ON

H. R. 16060

FEBRUARY 11, 1921

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COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.

HOUSE OF REPRESENTATIVES.

SIXTY-SIXTH CONGRESS.

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AMENDMENT TO SECTION 10 OF THE CLAYTON ACT.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
HOUSE OF REPRESENTATIVES,
Friday, February 11, 1921.

The committee met at 10 o'clock a. m., Hon. John J. Esch (chairman) presiding.

The CHAIRMAN. The committee has under consideration this morning H. R. 16060, to amend the interstate commerce act by adding thereto a new section, No. 20b, and to amend an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, by adding a new paragraph to section 10 thereof.

I will state that this is a bill which has been introduced in the Senate and I understand has been reported out by the Senate Committee on Interstate Commerce after a rather full hearing. I have copies of the hearings held before the Senate committee and the clerk will distribute those hearings to the membership present.

Mr. Thom, do you desire to open the discussion?

STATEMENT OF MR. ALFRED P. THOM, GENERAL COUNSEL OF THE ASSOCIATION OF RAILWAY EXECUTIVES, MUNSEY BUILDING, WASHINGTON, D. C.

Mr. THOM. Mr. Chairman, I trust the hearings will not be prolonged on this measure. The matter has been so fully gone into by a subcommittee of the Senate committee, by the full committee of the Senate, and after elaborate consideration by the Interstate Commerce Commission and hearing the chairman on the subject, and the bill itself now is reduced to such narrow scope that I am hoping the committee will have no difficulty in respect to it.

The chairman of the Interstate Commerce Commission is now in the room and is fully conversant with what went on in the Senate committee, and he will be able to correct any misapprehension that I may have that will appear in the brief statement I will make in respect of this matter.

The CHAIRMAN. About how much time will you wish to occupy, Mr. Thom?

Mr. THOM. I hope not more than 10 or 15 minutes.

The CHAIRMAN. Very well.

Mr. THOM. A bill was introduced into the Senate amending, in many substantial particulars, section 10 of the Clayton Act. That bill was referred to the Interstate Commerce Commission for its comment and criticism, and after making a study of it the commission

came back with amendments to the bill and presented it to the subcommittee of the Senate which had been appointed to consider this particular matter, that subcommittee consisting of Senators Townsend, Poindexter, Kellogg, Smith of South Carolina, and Stanley, of Kentucky.

As it came back from the commission much that we had hoped to have in the bill had been eliminated. For example, we had asked that the law should not apply to dealings in a commodity where there was only one seller and where competitive bidding would produce no result. We had asked that the question of what was the most favorable bid as contained in the section should not preclude the carrier from the exercise of an honest business discretion as to which was the most favorable bid.

We had asked that the carriers might be permitted after receiving bids to negotiate with the bidders for better terms and for a larger purchase. For example, if we had gotten bids on 500 box cars and the market had gone in such a direction that the bid was thought to be low on the increasing prices, that they might extend that to a larger number, and such matters as that.

The commission reported against those things and they were stricken out of the measure. Then there was inserted in the measure by the subcommittee a provision which I will read to the committee, and this was approved by the commission.

The CHAIRMAN. Where are you reading?

Mr. THOM. I am reading now from page 4 of the Senate bill 4576, which had in it this provision:

> This section shall not apply (*a*) to dealings between a carrier and a noncarrier corporation or company in which it has a stock interest amounting to more than one-half of the outstanding stock, or where the property of such noncarrier corporation or company is controlled by it through lease, nor (*b*) to dealings between a carrier and a noncarrier corporation or company which has a stock interest in the carrier amounting to more than one-half of its outstanding stock. Every such carrier is prohibited from purchasing materials, supplies, or other articles of commerce from any such noncarrier corporation or company at a price exceeding the then market value thereof at the place of delivery.

Mr. BARKLEY. Is that the bill that was reported in the Senate?

Mr. THOM. No, sir; that is the bill as reported by the subcommittee of the full committee of the Senate. When it got in the full committee that provision, although deemed by us exceeding necessary, was stricken out. So that the bill as finally reported by the full committee to the Senate is now identical with the bill H. R. 16060, from which much that we desired and much that we think on full argument could be obtained was eliminated.

The question has arisen with the carriers as to whether in its emasculated condition the bill ought to be pressed by us or not. The necessity, as the great majority of the carriers see it, of accommodating the law on this section to the transportation act is so great, and the necessity for excluding from its terms dealings between carriers, that I have been instructed to ask of this committee and of Congress that the bill, even in its emasculated condition, should be passed, expressing at the same time the hope that when Congress has more time and more leisure at the next session it will hear us in respect of matters not covered by this bill and will be prepared to accord

anything in the way of an amendment that may be sustained by reason and argument.

We come now to a situation, therefore, as to which it seems to us there should be no controversy. The Interstate Commerce Commission approves the bill, as I understand it, in its present form; would approve and did approve something in addition to what is now contained in it. The Senate committee has given elaborate hearings on it. After elaborate hearings by the subcommittee it was reported to the full committee and there further considered and there amended, and our hope now is that we can get this bill in its present form, identical with that in the Senate, on the calendar of the House and thereby obtain a chance of passing it at this session.

I wish to say it is of the most urgent consequence to many of these carriers that have one organization up to a State line and under the laws of the State necessarily, another organization in the State—that is true of Texas, that is true of Louisiana, and it is measurably true of Indiana and Illinois—so that the system working of these carriers may not be interfered with. The merits of this whole matter have been put before the Congress in the report to which the chairman has alluded, and as time is short I will not detain the committee by a more extended statement unless it is desired by some member of the committee to ask me questions.

Mr. SIMS. Mr. Chairman, I would like to ask Mr. Thom some questions. This bill, in effect, rewrites section 10 of the Clayton Antitrust Act, so far as it applies to carriers by railroad; is not that true, in substance?

Mr. THOM. Well, it depends upon what you mean by "rewrite."

Mr. SIMS. It seems to materially amend section 10 and amounts to rewriting same.

Mr. THOM. It is a mere amendment to section 10.

Mr. SIMS. Of course, the Clayton Act was considered and reported by the Judiciary Committee and the act itself provided that this section 10 should not take effect for two years from the passage of the Clayton Act; that is correct, is it not?

Mr. THOM. Yes.

Mr. SIMS. Now, during all of that time the railroad people and those interested in the section knew it was the law, and they had two years during which time they could certainly have brought their matters to Congress and asked for an amendment, just as they are doing now.

Mr. THOM. And they did that.

Mr. SIMS. It was not done.

Mr. THOM. It was not done by Congress. What do you mean by "it was not done"?

Mr. SIMS. You went before the Judiciary Committee, did you not?

Mr. THOM. Oh, yes; and the Judiciary Committee suspended it from time to time so that Congress might consider it.

Mr. SIMS. You mean by "suspending it" that the Judiciary Committee extended it.

Mr. THOM. Extended the effective date is what I mean.

Mr. SIMS. Yes; for a year at a time, and the Judiciary Committee passed on all those resolutions for an extension until the transportation act was passed, and in the passage of that act the Interstate and

Foreign Commerce Committee gave an extension of one year. Now, this is a matter that is so vital and so essential to the railroads, when we were considering the transportation act here for months in committee hearings before the House and Senate committees, and on the floor of the House, and in a very extended conference, why was not this matter presented to us so that we could determine the matter when we were trying to pass a law covering the entire subject of transportation?

Mr. THOM. It was, Judge Sims.

The CHAIRMAN. It was, in conference.

Mr. THOM. Yes; in conference.

Mr. SIMS. I know that, but the bills were presented here.

Mr. THOM. We presented such an application, I do not know whether to this committee or to the Members of the Senate. We presented and urged it and did all we could, and we were told that the transportation act could not wait for the consideration of that matter, and that the matter was to be dealt with in an independent measure. If there has been one subject as to which the carriers have been knocking at the doors of Congress from the time this act was passed until now, and have shown the greatest diligence, it is this. I have appeared time after time before the committees of Congress asking that this be done. I have drafted amendments. I have presented them, and finally, when it came to the transportation act, I was told by the Members of the Senate to whom I presented it, and who considered it, that they were not prepared to take it up in connection with the transportation act, and that it could not be done in that way, but must wait for an independent measure.

Mr. SIMS. But, Mr. Thom, this committee considered the transportation act concurrently with the Senate, and you yourself and other very able men representing the interests of the carriers appeared before us at great length and presented bills.

Mr. THOM. And the bill we presented had in it a provision on this subject.

Mr. SIMS. I do not recall.

Mr. THOM. If you will just read it, you will see that that is so.

Mr. SIMS. It may have been talked of in conference, but there was not, apparently, any very great effort to have section 10 of the Clayton Antitrust Act amended.

Mr. THOM. Judge Sims, you are mistaken. I can not let that go unchallenged. You are mistaken about that. We urged it in every way we thought was compatible with the courtesy we owed to the gentlemen who had it to consider. We could not get it through without both Houses, and when the Senate said they would not consider it in connection with the transportation act it was unnecessary to bring it here, although the whole subject was brought up by a section in the bill which we presented, which section, in order to throw the question open for discussion, contained a repeal of the section of the act.

Mr. SIMS. Yes; a repeal, but not an amendment.

Mr. THOM. No; but that brought up the whole subject, and then after that we presented an amendment and urged its consideration by the gentlemen having the transportation act under consideration in the Senate, and were told, after weeks of importunity, that they

would not consider it then, but would consider it as an independent measure.

The CHAIRMAN. It is my recollection you presented this matter in one of the memorials you presented to the conference, and I think in that memorial you included a proposed draft of section 10.

Mr. THOM. Yes, sir.

The CHAIRMAN. And I think you were advised by some members of the conference that in view of the fact that that legislation originated in the Judiciary Committees of the Senate and House, and in view of the fact that it added a new problem we did not think it was advisable to try and go into that matter, and that we would leave it and try as expeditiously as possible to get the transportation act on the statute books.

Mr. THOM. The only difference in my recollection and yours about that is that the first reason you give was not assigned, as far as I remember. The second one was that it added a new problem to the very many problems you had on the transportation act, and that you would not, therefore, consider it, but you will find an amendment in print in the memorial I filed with the conference committee.

Mr. SIMS. Mr. Thom, I am talking about what occurred here in the hearings and in the discussion here. If you or any other man representing the railroads made any lengthy presentation of the necessity for such legislation I have no recollection of it and have been unable to find it in the hearings. Now, what you may have done in the way of submitting something or in private conversations with members, of course, I would not contend about for a moment; but the point is that this antitrust act was a law considered by the Judiciary Committee and reported by it and it had jurisdiction of this subject all the time. So far as this committee is concerned, it seems to me on account of its being so intimately connected with the matter of transportation, the committee could have considered it, and there is no reason why it should not have considered it; but to wait until the dying hours of this Congress and bring it in as an emergency measure is something that does not seem fair to the members who did not have a chance to consider it originally and who can not possibly now give it the consideration they ought to give it if they act on their individual judgment and do not simply yield their judgment to somebody who is perhaps better prepared than they are to determine it for themselves; yet I think it is unfortunate when this committee has so many bills already reported that we are now asked to put this bill in such shape as to give it a privileged status in case the Senate passes it, and let all the other bills take their chances, especially in view of the fact that we are going to have a special session of the Sixty-seventh Congress so early. It seems to me it is a pretty large order on this committee just at this time.

Mr. THOM. I suppose that is an argument for you to address to the committee. It can not have much effect upon me. If you had done me the honor to read the memorandum which I presented to you you would have had the whole thing.

Mr. SIMS. I have read it.

Mr. THOM. You did not do me the honor to even read the memorandum, and if there is any lack of interest in the matter you, as one of the conferees, will have to answer those questions. The mat-

ter was brought to you in the form of a carefully prepared amendment. Everybody has recognized from the beginning that it is an interstate commerce matter as applied to these carriers. Even if the Judiciary Committee did undertake it, Congress passed it, and you, as a Member of Congress, passed on it—you took jurisdiction of the whole subject when you passed the transportation act and undertook to deal with this matter. It comes now to the place where it belongs. It belongs to the men who are formulating the policy of Congress in respect to interstate commerce. It belongs to this committee. It is a matter that this committee can understand better than any other committee which is not studying a cognate situation.

Mr. SIMS. That is merely concerning the time?

Mr. THOM. Yes, sir.

Mr. SIMS. This involves the subject matter of or the repeal of section 10?

Mr. THOM. Yes. You talk about the closing hours of the session; we asked at this session for a further extension of the effective date of an act which Congress passed and the President vetoed. What was left to us but to come at such time as this committee could hear us and present this bill? The chairman knows how long I have been asking for a hearing on this matter. He knows I have been haunting him, not in a way that was, perhaps, entirely pleasant to him, because he thought I was, perhaps, unduly pressing to have a hearing on this matter. We were confronted with the necessity of presenting it now, because the President vetoed the extension which would have enabled us to have a hearing on it in a more elaborate way during the coming session.

Mr. SIMS. Then, why do you blame me and Congress?

Mr. THOM. I do not blame you for anything. You are a Member of Congress and you have more authority; why did you not move to do it yourself?

Mr. SIMS. I did not want to do so.

Mr. THOM. Exactly.

The CHAIRMAN. I notice that there is a change in the bill from existing law in the increase made from $50,000 to $100,000.

Mr. THOM. That was the suggestion of the Interstate Commerce Commission.

The CHAIRMAN. Very well.

We will now hear Mr. Clark.

STATEMENT OF HON. EDGAR E. CLARK, CHAIRMAN INTERSTATE COMMERCE COMMISSION.

Mr. CLARK. I, too, shall endeavor to be brief and confine myself substantially to the measure now before the committee, although I shall be glad to answer any questions with regard to the proceedings before the Senate committee on the features of the bill as originally introduced and which were disapproved by the commission. Assuming that the committee is entirely familiar with those questions, I shall not advert to more than one or two of them, although, as I say, I will be glad to explain them if anybody desires further explanation.

When the transportation act was under consideration it was recognized that the powers which that act proposed to and subsequently

did confer upon the commission with regard to the supervision of capitalization and of the issuance of stocks and bonds for carriers subject to the interstate commerce act would be entirely out of harmony with the provisions of section 10 of the Clayton Act if they should become law.

Mr. SIMS. The transportation act covered dealings in securities—the original Clayton Act covered transactions and dealings in securities and the transportation act gave the commission supervision over their issue?

Mr. CLARK. That was what I tried to say. The transportation act gave to the commission jurisdiction of the supervision of the issuance of stocks and bonds.

Mr. SIMS. Yes, sir.

Mr. CLARK. It was recognized that that was entirely out of harmony with the strict provisions of section 10 of the Clayton Act. The effective date of section 10 of the Clayton Act had been successively postponed by Congress and was further postponed as a temporary measure by the transportation act, because, as I understood at the time—was informed—it was deemed inadvisable or impracticable to deal with that question in the transportation act and that it was better to defer it for independent consideration. As Mr. Thom has said, a further extension of the effective date of section 10 of the Clayton Act was provided by Congress and vetoed. Thereupon a bill was introduced out of which this measure has grown. The Senate committee submitted the bill S. 4576 to us for report. We found ourselves unable to agree with numerous of the provisions of that bill and so reported to the Senate committee and explained our reasons at a hearing before that committee. The result of that was the rewriting of the bill.

As originally proposed the bill would repeal section 10 of the Clayton Act. We were unable to approve of that suggestion for the reason that section 10 of the Clayton Act applies to numerous and unknown numbers and classes of common carriers engaged in commerce that are not at all subject to the interstate commerce act. We suggested, therefore, that it would be a great deal better to deal with this question by incorporating in this bill the regulations that should apply to railroads subject to the interstate commerce act and to amend section 10 of the Clayton Act by excluding from its provisions those railroads that are subject to this bill. This bill is drawn in that way and for that purpose.

It is, I think, not extravagant to say that it is and will be found impossible to carry through financial transactions and refunding plans that the railroads must carry through and at the same time comply with the provisions of section 10 of the Clayton Act. For example, it would be, we believe, wholly impracticable for a carrier that owns all of the stock of another carrier, an affiliated company, where they are operated as parts of a coordinated system, to effect any financing between itself and the subsidiary corporation and preserve the integrity of the system, if the parent company must advertise for bids in its proposal and the subsidiary company must, in turn, advertise for bids with regard to the acceptance of it.

Time is a most important thing in carrying through these financial plans, especially refunding plans. The carriers are not now permitted

to consummate any such transactions except after they have secured the approval of the commission, and it is essential, in order to take advantage of market conditions and of the funds that are available at the time, to do it with promptness. We think that would be impossible under the provisions of section 10 of the Clayton Act. We, therefore, have strongly indorsed this measure. We went so far as to indorse an additional provision, to which Mr. Thom has referred, but which the Senate committee eliminated, but we do not consider it vital and have no criticism of that elimination. It would be of some advantage to the carriers if they had that latitude, and we think that it could be exercised without any impairment of the public interest, but have no disposition to suggest restoration of it. The bill as it is now before the committee, H. R. 16060, effects the essential and important things as we see them, and for the reason that time is so important in these matters we think it very much better, if possible, that this bill should be adopted by the House as it was by the Senate, without change.

I should like to call your attention to one small but important matter, and that is the necessity of eliminating the comma in line 6, on page 2, following the word "made."

The CHAIRMAN. Are you using the House text?

Mr. CLARK. H. R. 16060.

The CHAIRMAN. What page?

Mr. CLARK. Page 2, line 6. There is a comma after the word "made" which ought to be omitted, for the reason, Mr. Chairman, that the preceding part of the sentence prohibits a carrier, after 60 days from the date when this section becomes effective, from having any dealings in materials, supplies, or other articles of commerce or making contracts—then skipping a line—for construction or maintenance of any kind, etc. We suggest the insertion there of the words "or have any contracts made after December 31, 1920." The idea is to condemn and prohibit any contracts made later than December 31, 1920, which are not in accordance with this paragraph and to protect against the possibility of oscillating contracts that might have been entered into before it is enacted that would be out of harmony with the provisions of this bill.

Mr. BARKELEY. Even with the comma in there it sounds a little awkward.

After 60 days from the date when this section becomes effective no carrier shall have any dealings in materials, supplies, or other articles of commerce, or shall make any contracts, or have any contracts made after December 31, 1920.

That sounds like they might have them in their possession—that is, any contracts made after that date.

Mr. CLARK. They could have them in their possession, but they could not make them effective; that is just what it is intended to do.

Mr. BARKLEY. They could not have them in their possession?

Mr. CLARK. They can have them in their possession, but they can not carry them out.

Mr. BARKLEY. That is the very thing that I am talking about. That language does not seem to me to be full enough to carry that meaning—they must not have them in their possession; they can not make them.

Mr. SWEET. That was in contemplation in the passage of this law?

Mr. CLARK. That was the idea—to prohibit making contracts while this was pending before it became effective which by an elastic provision could nullify the purpose of this act.

The CHAIRMAN. Your desire is to have the provision retroactive to the last day of December.

Mr. MONTAGUE. You mean to say that no contract made after December 31, 1920, shall be available—shall be null and void?

Mr. BARKLEY. Yes, sir; 60 days after the passage of the act.

Mr. CLARK. Unless they conform to the other provisions of this act.

Mr. BARKLEY. This language prevents them from having any dealings in materials, and so forth, after the passage of this act, and prevents them from making any contracts of that kind after the passage of this act. This phrase attempts to say that they shall not have any contracts made after December 31, 1920; they shall not have them or possess them. It does not seem to me to carry with it the full meaning that such contracts can not be in force.

Mr. MONTAGUE. They shall not have any contractual rights after December 31, 1920?

Mr. CLARK. That is the purpose of it; yes, sir.

Mr. SIMS. In other words, this act shall apply to any contract made after that date, whether so specified in the act or not, and it will cover the 60 days, as well as between now and the 31st of December.

The CHAIRMAN. Right in that connection you have raised the amount to $100,000. What was the purpose of that?

Mr. CLARK. Because the amount of $50,000 in the aggregate in any year we thought was too small. We thought that it was desirable to substitute, as we did, a calendar year, because any year might start at any time, and we thought that $100,000 in the aggregate for a calendar year ought to make possible dealings that are small enough to be ignored, so far as this law is concerned. May I say that the request of the carriers was that the limitation should be $50,000 in any one transaction. The commission rejected that and reported this in its place.

Mr. BARKLEY. Would it clear up that phrase if you put in line 6, "or have any rights growing out of any contract made after December 31, 1920"?

Mr. CLARK. I assume, Mr. Barkley, that the language might be made clearer. I have not any doubt that the purpose of it is clear and that it is free from liability or probability of misinterpretation or misapplication. I do not assume that there are any number of instances of that kind; I do not know of any. I do not know of any effort of that kind. It is a precaution against what might possibly be done.

Mr. BARKLEY. May I ask the reason of the commission in doubling the amount from $50,000 to $100,000?

Mr. CLARK. As Mr. Thom has said, the bill originally prohibited dealings where the amount is more than $50,000 in any one transaction. If passed in that way, any number of transactions, not exceeding $50,000 each, could be added together and an unlimited amount of dealing could be carried on. We thought that $50,000 in one year was too narrow a limit, and we recommended that the provision for

$100,000, in the aggregate, in a calendar year take the place of the carriers' proposition that it be $50,000 in any one transaction.

The CHAIRMAN. I notice that in line 19, on page 2, you have changed the language of the existing law, "whose bid is the most favorable to such carrier." Would the lowest responsible bid be the most favorable?

Mr. CLARK. I should say ordinarily it would; but I am not prepared to say that that would always be true.

The CHAIRMAN. Of course, the carrier could reject any and all bids?

Mr. CLARK. Yes, sir. That is specifically provided in the regulations which we prescribed under section 10 of the Clayton Act.

Mr. MERRITT. There would have to be considered the time of delivery?

Mr. CLARK. The time of delivery might affect that and the place of delivery. The bids might be close enough together in price but at different localities, so that when you added the necessary transportation charges to the lowest bid it would make it higher than the next lowest bid.

The CHAIRMAN. Would section 10 of the Clayton Act render it difficult and, perhaps, impossible in some instances to carry out the provisions as to consolidation in the transportation act?

Mr. CLARK. We think so; yes, sir. We think it would make it extremely difficult in financial transactions which are necessarily parts of any consolidation or acquisition scheme, which might be in complete harmony with the purposes of the transportation act. In other words, if the transaction must be by open bid and in addition to that the approval of the commission, there is the opportunity for anybody who is disposed to block the deal to take some action that would substantially prevent the consolidation.

The CHAIRMAN. The commission is now proceeding with the devising of plans for consolidation?

Mr. CLARK. Yes, sir.

The CHAIRMAN. It would be necessary, then, to amend section 10 of the Clayton Act in order that the commission might devise a plan for consolidation?

Mr. CLARK. I should think that it would not be necessary in order that we might devise the plans. We can devise a beautiful plan, but it would never become effective under the rigid rule of section 10 of the Clayton Act.

Mr. SIMS. The transportation act was passed after the Clayton Act?

Mr. CLARK. Yes, sir.

Mr. SIMS. If there is any conflict, does not the transportation act repeal by implication so much of the Clayton Act as may be in contravention of the transportation act?

Mr. CLARK. I should not expect any court to so hold, in view of the fact that the transportation act specifically postpones the effective date of section 10 of the Clayton Act.

Mr. SIMS. There would be no conflict as to what would be the effective date—continue just such part of the Clayton Act not embraced in the transportation act?

Mr. CLARK. But the transportation act postponed the effective date of the entire section. The postponement was with regard to all classes of carriers that were subject to that section.

Mr. SIMS. But if repealed, even by implication, it would not cut any figure in substance, as I see it.

Mr. CLARK. I do not think there is any necessary conflict between section 10 of the Clayton Act and the provision of the transportation act with regard to the supervision of the issuance of stocks and bonds that as a legal matter would lead to a holding that repeal of section 10, in so far as it applies to carriers subject to the interstate commerce act, was effected by implication. It is possible as a legal matter and as an administrative matter as to the provisions imposed upon the carriers to comply with section 10 and also the provisions of this bill, but the result would be nothing; we would accomplish nothing.

Mr. SIMS. It would be impracticable?

Mr. CLARK. It would be wholly impracticable.

The CHAIRMAN. Mr. Thom has suggested that the reason for amending section 10 of the Clayton Act is that the carriers ought to be relieved of purchasing by bids when there was but one bidder, and stated that that was one of the provisions they had in the bill as originally introduced in the Senate.

Mr. CLARK. Yes, sir.

The CHAIRMAN. Which was eliminated in the bill reported by the Senate committee. What force is there to that suggestion?

Mr. CLARK. That suggestion did not originate with us, Mr. Chairman. That elimination was made by the Senate committee after the bill was reported by the subcommittee. As presented in the original bill, S. 4576, it read in this way:

> This paragraph shall not apply where no competition is possible by reason of the fact that the article of the special type or characetr desired, or the desired supply, can be had only of a single maker or seller at the point required; nor shall it deprive a carrier of the right to exercise an honest business discretion in determining which bid, under all of the circumstances of the case, is by reason of the responsibility of the bidder or otherwise most favorable to its interest; nor to prevent it, after having taken competitive bids, from negotiating with one or more of the bidders, without further competitive bidding, to reduce the price or to secure more favorable terms or a more favorable contract, or from accepting a better offer so arrived at; nor from enlarging or reducing the quantity of the proposed purchase or work at a price arrived at by competitive bidding or otherwise as permitted in this paragraph.

We disapproved of all the latter part of that provision, Mr. Chairman, because, as we said, it left the bidding an empty proceeding; that if there was a disposition to favor a bidder, there was wide open statutory authority to do it. The taking of the bids, accompanied by a statutory right to negotiate with one or more of the bidders without further competitive bidding, to change the quantity and to change the price, and so forth, would afford the widest opportunity for the very favoritism which the Clayton Act intended to prevent. For example, if a carrier had in mind and intended to buy 1,000 units of anything and put out bids for 200 and A is the favored bidder, A could be told quietly, "You can make your price on 1,000." All of his competitors would be figuring on 200. And then after they had taken the bids they could say to A, "We will take your bid, as we may agree upon modifying

it, and will take 1,000 instead of 200." That would destroy the whole purpose of the act. So we disapproved of that, and as we left it in our report to the Senate committee it read in this way:

This paragraph shall not apply where no competition is possible by reason of the fact that the article of the special type or character desired or the desired supply can be had only of a single maker or seller at the point required.

The CHAIRMAN. That is eliminated from the House bill.

Mr. CLARK. That was eliminated from the Senate bill by the Senate committee, and as I say, I do not think it is a matter of sufficient importance to justify now going back to endeavor to restore it.

The CHAIRMAN. Under this bill a subsidiary carrier would not have to advertise separately for bids for its supplies, but could get them through the parent company practically at cost.

Mr. CLARK. It could get them from the parent company but the parent company is prohibited in this bill from charging it a higher price than it charges itself for the same thing at the same time.

The CHAIRMAN. Do you think that is a beneficial provision?

Mr. CLARK. We think it prevents the possibility of the parent company taking an advantage of its subsidiary and reaping commercial profits at the expense of the subsidiary, the effect of which would be to increase the operating expenses of the subsidiary out of proportion with those of the parent company for the same necessary supplies.

The CHAIRMAN. It has been charged that some of the carriers have been letting out their repair work to private shops and that although the work was done in the private shop at a higher rate than it could be done in the company shop, the object was that some of the officers of the company may have been interested in the private shop. Would this bill prevent such a practice?

Mr. CLARK. It would, within the limits of $100,000 in any one year, or rather in excess of $100,000 in any one year.

Mr. SIMS. Mr. Commissioner, in any of the annual reports or special reports that have been made by the commission since the enactment of the antitrust law, have any of the reports of the commission advocated any modification or change or amendment to section 10 touching railroad carriers.

Mr. CLARK. No; I do not think we have, Mr. Sims, and we have not had any occasion to do so. Section 10 never became effective until January 1, 1921, and the disposition of the Congress from time to time to postpone its effective date, coupled with informal statements that they proposed to take it up for revision as an independent measure, would present no occasion for us to recommend any change in it; but even if it had not been postponed, there was no occasion for us to challenge its provisions or to suggest any change therein until the transportation act put upon us the duty of supervising the issuance of stocks and bonds, and the lack of harmony between the two and the impracticability of complying with both, became apparent.

Mr. SIMS. I think your reply is absolutely just and fair. You did not care to be presumptuous and to give advice to Congress that was not asked, but since the transportation act has been passed, a year ago the 1st of next March, you have made an annual report. Did you make any suggestion that the transportation act as passed would interfere with the duties of the commission with reference to the

issuance of securities or make any statement that under its operation this would make it impracticable?

Mr. CLARK. We did not, for the reason that the effective date of section 10 of the Clayton Act was under suspension and measures were pending for a further suspension, which measures, I repeat, were passed by both Houses of Congress.

Mr. SIMS. Then that makes it very plain that the commission has not at any time been in an attitude in which it was called upon by implication or otherwise to make any request of Congress or to suggest any amendments. I do not question for a moment that Mr. Thom, representing the carriers, has always had in his mind and has always presented the suggestion that section 10 ought to be repealed.

Mr. THOM. Not repealed. I have presented amendments to the act as well as other suggestions.

Mr. SIMS. Perhaps I misunderstood you, but I understood you to say that the memorial about which you spoke recommended its repeal.

Mr. THOM. No; in the draft of the bill which we presented we had at first a provision amending the act, and finding some difficulty among ourselves in determining what we should suggest as an amendment, we simply reduced it to a section repealing section 10, but in the memorial which I presented to the conferees there was an elaborately drawn provision for its amendment.

Mr. SIMS. I understood you to say that in the bill you presented you provided for the repeal of section 10.

Mr. THOM. I just said that; yes.

Mr. SIMS. Replying to that, Mr. Thom, I am perfectly satisfied that section 10 never would have been passed if the Congress had waited for the carriers or those representing them to have urged the enactment of any such law. I have no doubt about that, and I have no doubt that it is an act considered as inimical to the carriers' interest, and I think the carriers have a perfect right and that you in representing them have a perfect right to advocate its entire repeal, if you could get it, or any amendment of it. There should not be any complaint about that, but I do think that during the consideration of the transportation act Congress might have considered the whole subject matter, including this matter as well as other matters. I want to ask Mr. Clark——

Mr. THOM (interposing). May I make myself clear on one subject? The attitude of the carriers has always officially been to ask an amendment and not a repeal of that section. We have always recognized the moral principle underlying this act, to wit, that the buyer and the seller should not be the same, and our position has been that we wanted an amendment of the act. As I have just explained, when we presented our bill to Congress it at first contained suggestions for an amendment, but among ourselves we could not agree upon the exact terms, and therefore the subject was briefly covered so as to bring it up for discussion in the way that I have stated.

The CHAIRMAN. Are there any other questions?

Mr. SIMS. Yes; I would like to ask Commissioner Clark another question, but I did not want to be in the position of stopping Mr.

Thom from making any statement he wanted to make, as I may have misunderstood him.

Mr. Commissioner, is it your view that this matter is so urgent that it would likely hamper the commission or the carriers between now and the time when this matter can and will be considered by the next Congress?

Mr. CLARK. I can not predict with certainty what the effect will be, but, illustrative of the thought, I will say that we have before us now——

Mr. SIMS (interposing). I do not ask you to go into details.

Mr. CLARK. I am not going into very much detail. We have an application before us now for approval of the preliminary steps in the refunding of $214,000,000 of bonds of two carriers that have jointly assumed the obligation. They fall due the 1st day of July. I regard it as not only impracticable but as morally certain that that refunding plan could never be carried through under the provisions of section 10 of the Clayton Act.

Mr. SIMS. And you could not authorize it on that account?

Mr. CLARK. It is impossible to go through the machinery and get it done and make it effective and get the money. I do not say that we are going to approve their plan as it is.

Mr. SIMS. The reason I asked the question was that I understood Mr. Thom to say that this bill was not wholly satisfactory and that they would make a further attempt, and what I had in mind was that it is assumed, at least, that there will be an early extra session, and I thought perhaps the whole subject matter might be thrashed out as to further amendments as well as this amendment; and wondered whether or not there would likely be any great damage to occur between now and then. In addition to that, I would like to ask you this question: Suppose we put a limitation on this bill, say, for two years, and in the meantime, of course, Congress will have an opportunity to consider the other matters that the carriers desire to be considered with reference to the Clayton Act, and this will not be wiping it out entirely. Why could we not limit this to some such time as that and in the meantime give Congress and the carriers and others interested such time to thrash out and study the entire problem so that every member of the committee would be well prepared to pass upon it? So far as I am concerned, I have never studied the Clayton Antitrust Act fully, and do not profess to know very much about it.

Mr. CLARK. The only change this bill makes in the Clayton Antitrust Act is to exclude from its provisions the carriers that are subject to this measure. It leaves section 10 of the Clayton Antitrust Act just as it is with regard to all other corporations or carriers. I have appreciated ever since we began the discussion of this among ourselves, at the request of the Senate committee, that Mr. Thom and those whom he represented would probably be disappointed at some of the views we took.

Mr. SIMS. Of course, you are not responsible for that.

Mr. CLARK. I am responsible for doing the thing which I believe to be right, and if I believe it to be the right thing, the fact that Mr. Thom will be disapopinted is not going to influence me.

Mr. SIMS. Of course not, and Mr. Thom knows that.

Mr. COOPER. Mr. Clark, following out the line of thought of Judge Sims as expressed in his questions to you, suppose this Congress delayed action on this bill? You say you believe it is very important. You have not any assurance that the extra session of Congress will immediately take this up and pass it at once, have you?

Mr. CLARK. None whatever, and in the meantime I am confident that there will be some very bad effects, and at a very critical time in efforts to finance railroads and keep them out of the bankruptcy courts.

Mr. SIMS. Mr. Clark has not answered my question as to making this bill apply for only two years.

Mr. CLARK. If the Congress sees fit to put a limitation of two years on this, that would not arouse any opposition on my part, except I think I should offer the suggestion that it would be a very peculiar and a very difficult situation to take these carriers out from under the provisions of section 10 for a period of two years and then put them back again. The Congress can amend or repeal this or any other act of Congress at any time.

Mr. SIMS. I am assuming there will be a law passed before that time to take care of the matter.

Mr. DENISON. Mr. Clark, can any public good be served by requiring advertising for bids where the railroads are buying an article that is patented and where there can be but one bidder?

Mr. CLARK. I do not know that any public good can be accomplished and I do not think any harm can be accomplished because the taking of bids then is a very simple process.

Mr. DENISON. That was the next question I was going to ask you, if there could be any harm to the railroads by requiring that.

Mr. CLARK. I do not think so. I think the idea that the Senate Committee had in mind was that it is difficult to frame this legislation so that it would apply only to articles possessed by one person by virtue of a patent right. There are opportunities for some things that might not be desirable if you go any further than that, and in view of the fact that there is no difficulty about taking a bid in a case of that kind, we thought it was not important to suggest any restoration of that provision.

Mr. DENISON. Do you anticipate that if this bill should become a law that there could be or would be any embarrassment to the railroads in cases of catastrophes where they suffer very heavy loss.

Mr. CLARK. I do not think so.

Mr. DENISON. By fire or flood or something of that kind where they would have to have large quantities of materials.

Mr. CLARK. I do not think there would be any difficulty about it. In case of a flood, the railroads are going to avail themselves of the material that is at hand and there is no limitation in this bill upon the railroad, in a case of that kind except when there is some community of officers or identity of interests between the purchaser and the seller. They can buy as they choose where that identity or community is absent, and if they had a catastrophe, I do not think it would be any hardship to get the supplies from available sources without seeking a source where there is that identity of interest or community of officers.

Mr. SIMS. They can do that now, can they not?

Mr. CLARK. They can. That is the only limitation this places upon them. It is an effort to curb and prevent the same person from being the buyer and the seller, and having the inside track and making a profit at the expense of the carriers who are supported by the public.

The CHAIRMAN. That is what we want to prevent.

Mr. WINSLOW. Does it ever work the other way, Mr. Commissioner, where there is what you might call a wheel within a wheel that works to the advantage of the railroad?

Mr. CLARK. Yes, sir; and that is provided for in this bill. There is a provision here that the parent company may sell supplies to its subsidiary so long as it does not charge it more than it charges itself. That is one of the purposes of this bill. It is a very customary thing, and a right thing, for a large system of road, operated as a system, although composed of different legal entities and different corporations, all subsidiary to one parent company, to buy supplies for the entire system, taking advantage of buying in large quantities, and the only curb this bill puts upon that practice is that the parent company shall not charge its subsidiary more than it charges itself.

The CHAIRMAN. Plus cost of transportation.

Mr. CLARK. Plus cost of transportation.

Mr. WINSLOW. Suppose Company A is owned directly by the owners or directors, or both, of a railroad company, and that Company A is disposed to give an advantage to the road it directs or owns or controls.

Mr. CLARK. And if it does, under this measure, Mr. Winslow, the only limitation upon it is that it shall bid against others that may want to bid against it.

Mr. WINSLOW. Is there anything in this bill or is there any law that precludes a supply company so owned from having a favored customer in the form and shape of another company owned and directed by the same people; is there any favored-nation clause prohibited here?

Mr. CLARK. Only as it is prohibited under section 10 of the Clayton Antitrust Act, and it would be prohibited here except where it was done under open bidding. There is no proposal here, and I do not think there is any reasonably to be expected effect of preventing the railroad from getting every advantage it can possibly get from dealing with a concern where there are common officers or an identity of interest. The only requirements here is that where that identity or community exists, there shall be open bidding. If a railroad gets an advantage or if there is a natural advantage from dealing with its affiliated company, it will not be prevented from doing so here if that company will sell as cheaply and under as good terms as others.

Mr. WINSLOW. Then under that condition unless there is open bidding, the railroad would not be allowed to take advantage of any inside benefit it might have otherwise.

Mr. CLARK. No.

Mr. DENISON. Mr. Clark, suppose a company in which some of the directors of the railroad are interested should be in a position to furnish labor to the railroad, would this bill prevent the railroad from getting that labor without asking for bids?

Mr. CLARK. I do not think so.

Mr. DENISON. I was just wondering if you are sure about that. I can conceive of a company supplying a railroad with repair work or different kinds of labor in large amounts, and I was wondering if this bill would require the railroad under those circumstances to ask for bids for that work.

Mr. CLARK. I do not think so, Mr. Denison, for the reason that this prohibits dealings in materials, supplies, or other articles of commerce except under these terms.

Mr. DENISON. And you would not consider labor to fall within that category.

Mr. CLARK. I do not consider labor is included in any of those phrases.

Mr. BARKLEY. How about the language "or shall make any contracts or have any contracts made for construction or maintenance."

Mr. DENISON. Yes; I had in mind the provision with reference to contracts when I asked that question.

Mr. CLARK. They are only required to take open bids if they have common directors. If the company with which the identity of interest lies prevails in the field of open bidding and makes the most favorable bid, they are at perfect liberty to close their contract.

Mr. DENISON. But it would have to be by bidding.

Mr. CLARK. A contract for construction or maintenance; yes.

Mr. DENISON. If there was any probability of the amount of that work exceeding $100,000 in the course of the calendar year, then the railroads could not have that work done except at a great risk, without asking for bids to begin with.

Mr. CLARK. If the probability is that the dealings will exceed $100,000 in a calendar year, the only safe course for the company to take would be to get bids.

The CHAIRMAN. Is the average dealing in supplies and other articles of commerce or contracts for construction and maintenance so well determined by each carrier that they could know at the beginning of the calendar year whether or not it would have to come under the open-bidding process or whether they could ignore it?

Mr. CLARK. I think the experiences of the carriers are such that they can determine with approximate accuracy whether or not their transactions with a certain concern would probably come within that limit.

The CHAIRMAN. My thought was that a company might consider it would not exceed $100,000, and for the first seven or eight or nine months of the calendar year not go to the open-bidding plan, but toward the last of that calendar year some large needs might arise and they might feel that they will exceed $100,000. What situation would they be in in such a case?

Mr. CLARK. I think they would have to keep within the limit of $100,000 or ask for bids.

Mr. WINSLOW. Is $100,000 a very large amount for one concern to furnish to a railroad?

Mr. CLARK. No.

Mr. WINSLOW. It is pretty small, is it not?

Mr. CLARK. I consider it a moderate sum, but it is twice as much as $50,000.

Mr. WINSLOW. Yes; we can probably agree on that. It seems to me it is a very small allowance for a great railroad. Take, for instance, the matter of crossties, if I am not mistaken, at least one road that I know of has a wood-chopping gang that makes those ties, and $100,000 for crossties for some of these roads would be a very small amount.

Mr. CLARK. That is true.

Mr. WINSLOW. And there must be other lines of manufacture and production where $100,000 would be a piker's amount.

Mr. CLARK. Yes; a very modest sum when you consider the large sums that are necessarily involved in the purchase of materials and supplies by railroad companies; but we must not lose sight of the fact that this bill, taking the most extreme view of it and placing the strictest interpretation upon it, imposes nothing in the shape of a restriction upon the carrier in making its purchases in its own way and from whom it chooses, except when there is that identity of interest between the owners and directors and officers of the railroad and somebody in a similar position in connection with the concern from which the purchases are to be made, and then the only restriction is that they shall take open bids and allow this concern to bid along with others, if others choose to bid.

The CHAIRMAN. There is the limitation in the transportation act that they must be honest, efficient, and economical.

Mr. CLARK. Yes; I say there is no restriction in this bill.

The CHAIRMAN. No.

Mr. CLARK (continuing). Upon the carrier exercising its option except when this identity of interest is present, and when that is present there is no limitation except that others shall be permitted to bid against the one with which the identity of interest exists.

Mr. BARKLEY. In other words, a railroad can buy $1,000,000 worth of supplies from some disconnected company without taking bids; but if it proposes to buy $1,000,000 worth from some company where the same officers are officers of the railroad and the supplying company then they must advertise for bids.

Mr. CLARK. Yes.

Mr. BARKLEY. And then after advertising for bids, if the most favorable bid is made by this identified company they can accept the contract.

Mr. SIMS. I would like to ask Mr. Clark this question. Neither section 10 of the Clayton Act nor this bill, as I read them, although I have not given them close study, would apply to a stockholder. He must be an officer or director or buying or selling agent. Does it apply to stockholders in the carrier companies and also to supply companies?

Mr. CLARK. It applies to any person "who has any substantial interest in."

Mr. SIMS. It would apply to a stockholder?

Mr. CLARK. If he had any substantial interest.

Mr. SIMS. If a stockholder in a railroad company was also a stockholder in a supply company and the amount of the purchase was more than $100,000 a year, this act would apply to him as an individual, but would it prohibit a stockholder who is neither a director nor an officer of either company?

Mr. CLARK. The act provides that "when said carrier shall have as a director, president, manager, purchasing or selling officer, or agent in the transaction any person who is at the same time a director, manager, purchasing or selling officer or agent in the transaction of, or who has any substantial interest in, such other corporation, firm, partnership, or association," they are prohibited from dealing, except upon open bids.

Mr. SIMS. It does not matter whether he is an officer or director or simply a stockholder of the two companies having a substantial interest in the two companies?

Mr. CLARK. I do not so understand.

Mr. SIMS. That is what I want to know, whether it applies to an ordinary stockholder who has no official connection?

Mr. CLARK. No. If a railroad has a "director, president, manager, purchasing or selling officer, or agent in the transaction any person who is at the same time a director, manager, purchasing or selling officer, or agent in the transaction" of the company with which the deal is to be made, or who has any substantial interest in that company, they are prohibited from dealing, except under open bids. He might own stock in both companies if he were not a director, president, manager, purchasing or selling officer, or agent in the transaction——

Mr. SIMS (interposing). And the law would not apply?

Mr. CLARK. No, sir.

Mr. SIMS. If an individual does not come within the official designation pointed out, but owned a majority of the stock of the railroad or had a substantial interest, that company could go ahead and transact business, provided the officers of the two were not directors, or represented by an agent?

Mr. CLARK. If they did not continue as common officers or purchasing agents or agents in the transaction. I do not attempt to say what an agent in the transaction may be—they would not be prohibited by this from dealing with each other.

Mr. WINSLOW. I should like to ask you two questions in one. Who is supposed to be benefited by these provisions, and where is the harm supposed to be in case this provision is not included?

Mr. CLARK. The harm lies in the fact that instances were known, and, perhaps, a great many others were suspected, in years gone by where directors and officers of the railroads enriched themselves by buying from a concern which they owned or controlled, or had a substantial interest in, at prices that were higher than could have been obtained in the open market. That is what section 10 of the Clayton Act was intended to stop, and, so far as we are concerned, we do not propose to open here that door.

Mr. WINSLOW. And the good to be obtained is the negative side of what you have just stated?

Mr. CLARK. The good to be obtained is to prevent those things, stop them if any do exist, and stop them from growing, if they do not exist.

Mr. WINSLOW. Do you not think that there is a chance of advertising the business of one concern unduly to the advantage of another which is benefited?

Mr. CLARK. I do not think so.

Mr. WINSLOW. Suppose I have a process by virtue of which I can make an article cheaper than my competitor and I can undersell him a little and make a good profit, or I can undersell him a lot and make a good profit, but in order to get that advantage I will have to advertise it?

Mr. CLARK. No; I do not think you will have to advertise it. Under these circumstances if you wanted to bid you would bid on the same specifications and terms that others did, and I think that you would not disclose anything except the price at which you would be willing to sell.

Mr. WINSLOW. In competitive business that is regarded as a good deal of information many times?

Mr. CLARK. Yes, sir.

Mr. BARKLEY. Would he not have to do that when he happens to be an officer of the company that he proposes to sell to?

Mr. CLARK. Not at all. Neither the company, where there is identity of interest, nor the company where there is no identity of interest, is bound to bid if it does not want to.

Mr. SIMS. Suppose the officer, agent, and stockholder were put into the same category?

Mr. CLARK. I think that would make the bill impossible, because it is a matter of no concern to either company, and if some individual should happen to own a few shares of stock in two corporations it would prevent the two corporations from dealing with each other.

Mr. SIMS. It is true that the stockholders, directors, managers, and officers must pay some attention to their constituents, the stockholders?

Mr. CLARK. I think if they paid more attention to them, or if the constituents paid more attention to the directors, the world would be better.

Mr. SIMS. You think it is lack of attention rather than too much attention?

Mr. DOREMUS. Mr. Clark, I am sorry that I was not present when you began your statement, and it is possible that what I have in mind has already been covered by what you have said.

Is it a correct statement to say that this bill makes no material change in existing law, except to exclude dealings in securities from the operation of section 10 of the Clayton Act, and to increase the limitation from $50,000 to $100,000?

Mr. CLARK. I think that is an accurate statement of the effect.

Mr. THOM. I think we ought to add the elimination, except under prescribed terms, of dealings between carrier companies.

Mr. DOREMUS. From to time Congress, upon the representation of the railroads that section 10 of the Clayton Act could not be enforced as a practical matter, has postponed the effective date of the Clayton Act. As I understand it, none of the objections that heretofore have been raised and which have moved Congress from time to time to postpone the effective date, are covered by this bill.

Mr. CLARK. Oh, I think they are. I think, in connection with the jurisdiction which the transportation act gave the commission over the supervision of the issuance of stocks and bonds, that this bill preserves all the limitations upon these carriers of the Clayton Anti-

trust Act, except as they may be modified in the regulation of the issuance of securities. It makes it possible for the commission to effectively carry out the purposes of the transportation act in that regard, which, while carried out, would be wholly impracticable in effect if bound by the limitations of section 10.

Mr. DOREMUS. I am wondering if Congress should pass this bill whether the carriers would feel justified in again coming to Congress, at a subsequent date, and asking for a further postponement of the effective date. That is what I had in my mind.

Mr. CLARK. I do not think that they would have any use in asking for a further postponement of the effective date of section 10 of the Clayton Act, because if this becomes a law these carriers are no longer subject to the provisions of that section, but they will be subject to all the provisions of the transportation act, including this addition thereto.

Mr. SWEET. Mr. Clark, how extensive will be the contracts of the carriers which would come within the purview of this proposed act; that is, as to the purchasing of supplies, materials, etc.?

Mr. CLARK. I think, with regard to some railroad companies, unless they change their policy, that they would be very extensive, because some companies have organized subsidiaries for the purpose of providing fuel, ties, performing refrigeration, and other large items of that kind. They can no longer deal with those subsidiaries without permitting others to bid against them if this becomes law. As to other companies, I imagine their practice will not be affected at all.

Mr. SIMS. I should like to go a little further. When I spoke of fiscal agents I had in mind banks, trust companies, or syndicates, to whom are turned over by the railroad companies many million dollars worth of stock or bond issues to be floated, fiscal agents in the sense of having the securities which you will have jurisdiction of. Are they also covered by the limitation in the bill?

Mr. CLARK. I think they are covered by the words "agent in the transaction."

Mr. SIMS. I used the word fiscal agent or stockholder, and I thought perhaps that you had in mind stockholder rather than fiscal agent.

Mr. CLARK. My answer did go more to the stockholder proposition than to the fiscal agent. I should, perhaps, have added at the time that I think fiscal agent is covered by these words, "agent in the transaction." I think the idea of an individual being a small stockholder in both companies is not worthy of notice.

Mr. SIMS. Is not material?

Mr. CLARK. Is not material in any way.

Mr. SIMS. I had reference to a very large stockholder or fiscal agent who would handle their securities.

Mr. CLARK. We think that is fully covered in the language of the bill.

The CHAIRMAN. May I call attention to paragraph 7 on page 4? Was that put in by the commission?

Mr. CLARK. Yes, Mr. Chairman; that was put in by the Senate committee at our suggestion. If you will turn to section 20a of the interstate commerce act you will find in paragraph 12 these words—

perhaps it will be interesting to you to follow the paragraph to which Mr. Thom has referred as I read from section 20a:

After this section takes effect it shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier.

You will see that the wording of paragraph 7 of this bill is substantially identical with that which I have read from section 20a, but you will note that section 20a is confined to the securities issued or to be issued by such carrier, and we can not see any reason why there should not be the same prohibition against making a personal profit from the transaction if it was the security of some other corporation not issued by that carrier, but which that carrier was either purchasing or selling.

The CHAIRMAN. Is that all, Mr. Clark?

Mr. CLARK. Yes, sir.

The CHAIRMAN. I notice that Mr. McNamara and Mr. Doak are present. Do they desire to be heard?

Mr. DOAK. No, sir.

The CHAIRMAN. Are there any other parties present who desire to be heard? [After a pause.] If not, this will close the hearings, and we are much obliged to you gentlemen for appearing this morning.

STATEMENT SUBMITTED BY MR. GLENN E. PLUMB.

MEMORANDUM BY GLENN E. PLUMB, GENERAL COUNSEL OF THE 16 ASSOCIATED RAILROAD LABOR ORGANIZATIONS, IN REFERENCE TO HOUSE BILL 16060, AN ACT TO AMEND SECTION 10 OF THE CLAYTON ACT, INTRODUCED BY HON. JOHN J. ESCH.

I have not had an opportunity to examine the Esch bill, but I take it for granted that it is the same as the Townsend bill, which was recently reported to the Senate.

The Townsend bill is really the original Frelinghuysen bill, amended so as to incorporate the suggestions of Chairman Clark of Interstate Commerce Commission.

I appeared before the Senate Committee on Interstate Commerce while the Frelinghuysen bill was being considered, and I had an opportunity to consider Chairman Clark's amendments.

I took occasion at that time to commend those amendments, but I think I made it clear that I did not feel they were adequate to protect the public interest. So far as they went they were all right, but they did not go far enough.

Perhaps I can not do better, in order that there may be no misunderstanding on this point, than to cite the record of the Senate committee.

In my testimony on page 109 of the hearings I said:

Before beginning my statement I want to say that I listened to the testimony of Commissioner Clark, and that we commend all of the suggestions as to changes in the Frelinghuysen bill that were made by the commissioner.

On page 116, pointing out the shortcomings of the Frelinghuysen bill as amended, I said:

If we are to permit this common interest to exist, then for the protection of the common good the men possessing that interest must be denied any discretion

whatsoever in administering public affairs conflicting with that common interest. If we deny them the right to that common interest, and they are not possessed of conflicting interests, we will have the benefit of competition without the effect under the law. You have got to reach right there into that; that is the evil, and we must either remove it or apply the only corrective. If we do not remove it everything that we do is merely to salve a constantly increasing sore.

On page 117 I said:

If the policy announced by the transportation act to make the Interstate Commerce Commission responsible for the honest, efficient, and economical operation of the railways is to be enforced, either the community of interest existing between those who control railway operation and those who control outside corporations dealing with the railways must be ended, or, if that be not accomplished, then complete authority over the transactions between the railroads and outside concerns must be vested in a public agency that is free to act in an unbiased and unprejudiced manner.

Now there are two courses to be pursued: Either extinguish the interest or take away the discretion and authority, making it subject to final review by an unbiased public agency. Of the two, I prefer the former, for if we vest all the authority in this public agency, and political agency, then the control of that agency becomes the prize of all political campaigns, and you have thrown into politics the entire question of railroad management.

On page 132, Senator Stanley asked:

Is it your opinion, Mr. Plumb, that the enactment of the act as suggested by Mr. Clark would be beneficial to the interests you represent?

Mr. PLUMB. It will be beneficial to us and the public both, because it makes more effective the remedy to secure the purpose of section 10. But neither the Frelinghuysen Act as amended by the suggestions of Mr. Clark nor the Clayton antitrust act reached the real seat of the evil or the joining of a common interest on both sides of a very important railway transaction.

Senator STANLEY. How would you reach them?

Mr. PLUMB. By depriving this common interest of any more power to determine the price which it shall receive for its commodities than labor has to determine the prices which it shall receive for wages. Place that discretion in a tribunal, as you have in the wage board and the Interstate Commerce Commission, and make it the judge of what may justly be paid for those services and for the services of capital.

Senator STANLEY. You mean you would compel the members of a privately controlled concern to sell to the public utilities by the Interstate Commerce Commission or some other commission?

Mr. PLUMB. That is what we are doing with labor, controlling the price of private means contributed to this public service.

You will see from this testimony that I commended the amendments proposed by Mr. Clark as being beneficial, in that they did make section 10 of the Clayton Antitrust Act more effective than it would have been without the amendments, but I fairly pointed out that even with these amendments the proposed act failed to reach the real seat of the evil. To become a really effective measure the act should have gone further even than the suggestions of Mr. Clark. It should have vested in the Interstate Commerce Commission, or some other unbiased body, complete jurisdiction over the determination of prices of all materials and supplies furnished to the railways by outside concerns under the control of the same financial interests that elected the directors, managers, and officials of the railway corporation.

I am anxious that there shall be no mistake as to the position I took at this hearing. There can not be any misunderstanding on the part of anyone who reads the record.

(Thereupon the committee adjourned.)

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